United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-4231

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AMSHU ASSOCIATES, INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantia! evidence on the record as a whole supports the Board's finding that the Company engaged in coercive interrogations and threats of reprisals in violation of Section 8(a)(1) of the Act.

2. Whether substantial evidence on the record as a wh le supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging Hopkins.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order (A. 2, 3-23),[1] issued against AMSHU Associates, Inc. (hereinafter "the Company") on June 25, 1975, and reported at 218 NLRB No. 127. This Court has jurisdiction, the unfair labor practices having occurred at Spring Valley, New York.

I. THE BOARD'S FINDINGS OF FACT

The Company is engaged in the construction and operation of apartment developments (A. 5, 31, 94-95, 115, 185-186, 209-210). In September 1973, the Company hired Thomas Hopkins as resident superintendent for Sleepy Hollow Gardens, an apartment development under construction in Spring Valley, New York (A. 7; 36-37, 44, 160-161, 186, 203-204). Hopkins had been a resident superintendent in the New York area for around 25 years (A. 8, 19; 36, 47, 270). As tenants began to move in, Hopkins' focus shifted from readying the apartments for occupancy to remedying tenant complaints (A. 7, 39, 116-117, 124-125, 130, 162-163, 232-233).. Hopkins was assigned a regular 8-hour work day, 5 days a week, but it was understood that he would be available to take care of emergency complaints from tenants 24 hours a day, 6 days a week (A. 8; 39, 92-93, 152, 158, 169, 186, 215-216). To facilitate this,

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[1] References designated "A." are to the Appendix. References preceding a semicolon are to the Board's findings; those following refer to supporting evidence.

Hopkins was given an apartment in the development as part of his compensation (A. 8; 37). It was understood that Hopkins' wife was expected to move into the apartment with him, for the resident superintendent's wife would be then available to take calls and relay messages when the superintendent was necessarily absent (A. 8; 61-63, 84). Both Hopkins and his wife moved into Sleepy Hollow Gardens shortly after Hopkins became superintendent, and both lived there until Hopkins' discharge (A. 9; 47-48, 49, 61, 80-83). Hopkins owned a retirement home in Yonkers, New York, and often went there on his days off (A. 9, 19; 46, 261, 272, 273-274, 282-284). In both December 1973, and May 1974, Hopkins received raises in pay (A. 14; 248, 45, 165-166, 167, 202).

By the spring of 1974, the number of tenants approached 100 (A. 7; 168). In June, Hopkins complained to Company Vice-President Mark Weidman that he needed assistance in covering his job (A. 10; 34-36, 40, 64-65).[2] Weidman stated that the Company could not afford it. This induced Hopkins on June 24, 1974 to sign up with the Building Service Employees International Union Local 32E, AFL-CIO (hereafter "the Union") where Hopkins formerly had been on withdrawal status for many years (A. 10; 40-41, 56-57, 66, 67, 69, 71-72, 262-264). On the same date the Union sent the Company a letter demanding recognition at Sleepy Hollow Gardens (A. 10; 292, 72). On June 25, Weidman and the Union attended a representation proceeding at the New York State Labor Relations Board involving Spring Valley Gardens, an apartment development owned by Spring Valley Associates located about 1-1/2 miles away from Sleepy Hollow Gardens (A. 10-11; 85, 125-126, 161, 263). Inasmuch

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[2] Weidman was also a partner in Spring Valley Associates, a partnership which along with the Company formed a single integrated enterprise (A. 5-6). Weidman executes the labor relations policy for both the Company and Spring Valley Associates (A. 5; 31, 87, 89-90, 91, 93, 98-99).

as the Union had also filed with the State Board a petition for certification at Sleepy Hollow Gardens, Union business agent Kenneth Childers sought Weidman's agreement that the two proceedings should be held together (A. 11; 262-264). Childers informed Weidman that Hopkins had signed up for the Union. Weidman replied that he intended to discharge Hopkins because "he is not living there. He didn't move in" (A. 11; 264, 211). Childers warned Weidman not to do this. During this same conversation, Weidman threatened to dock the pay of George Schmidt, the resident superintendent of Spring Valley Gardens, for attending the State Board hearing. Apparently the attorney for Spring Valley Associates interceded and Weidman did not effectuate his threat.

About June 28, 1974, after Hopkins reactivated his Union membership, Weidman told him "I see you joined the GD [Goddamn] union" (A. 12; 41, 42, 75). When Hopkins assented, Weidman replied that Hopkins "would not be around here very long" (A. 12; 42, 75, 76). Hopkins then remarked that the Union told him that Weidman could not fire him on account of his union activity. Weidman's response was that the Company would find some way to get rid of Hopkins.

By letter dated July 8, 1974, the Company advised Hopkins that he was discharged, effective July 22. The letter stated that he was being replaced, "it having become apparent that you have no intention of residing in the building" (A. 6, 7; 295, 43, 44, 208, 210).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts the Board in agreement with the Administrative Law Judge, found that the Company violated Section 8(a)(1) of the Act by coercively interrogating Thomas Hopkins and by threatening to discharge him because of his union activities. The Board also found that

the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employee Hopkins (A. 18-22).[3]

The Board's order requires the Company to cease and desist from the unfair labor practice found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order directs the Company to offer Hopkins full and immediate reinstatement to his former position, to make him whole for lost earnings, and to post customary notices (A. 25-28).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING AND THREATENING TO DISCHARGE HOPKINS ON ACCOUNT OF HIS UNION ACTIVITY AND THEREAFTER VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING HOPKINS BECAUSE OF HIS UNION ACTIVITY.

As shown in the Statement, Hopkins did not rejoin the Union until June 24, 1974, around nine months after he had assumed the position of resident superintendent at Sleepy Hollow Gardens. The next day Union business agent Childers mentioned that Hopkins had joined the Union to Company Vice President Weidman at a proceeding before the New York

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[3] The Board also found that Spring Valley Associates engaged in a single incident of unlawful interrogation but declined to issue a remedial order based on that violation (A. 24). While the employee interrogated was thereafter discharged, the General Counsel declined to issue a complaint based on this occurrence. The supervisor who committed the unfair labor practice no longer works for Spring Valley Associates. No other employee of Spring Valley has been found to have its rights under the Act interfered with. There is little contact between the employees of Spring Valley Associates and those of the Company, notwithstanding the fact that the two enterprises

(continued)

State Labor Relations Board on another matter. Weidman replied that the Company was intending to discharge Hopkins because he had never moved into Sleepy Hollow Gardens. Several days later, Weidman asked Hopkins about his union activity, saying "I see you joined the GD union" (*supra*, p. 4). When Hopkins answered affirmatively, Weidman replied that Hopkins would not be around here very long and that Weidman would find some way to get rid of him. This threat of discharge for joining the Union is obviously in violation of Section 8(a)(1), and viewed in conjunction with this threatened retaliation, Weidman's hostile inquiry about Hopkins' having joined the Union is patently coervive. See *N.L.R.B. v. Rubin*, 424 F.2d 748, 751 (C.A. 2, 1970).[4]

Furthermore, it is evident that Weidman's threat to find some cause to discharge Hopkins following immediately after his having secured Hopkins admission that he had joined the Union, comes close to a before the fact admission that the discharge, a little more than a week later, was motivated by Hopkins' interest in the Union. See *N.L.R.B. v. Cousins Associates*, 283 F.2d 242, 243 (C.A. 2, 1960); *N.L.R.B. v. Ferguson*, 257 F.2d 88, 92 (C.A. 5, 1958). The timing of the discharge soon after Hopkins joined the Union also supports the Board's inference of discriminatorily motivation. The Company tolerated Hopkins' alleged non-residence

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[3] (continued) are a "single employer" under the Act.(A. 5-7). See *Radio & Television Broadcast Technicians Local Union 1264, IBEW v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965). In all these circumstances, the Board determined that the purposes of the Act would not be effectuated by ordering a remedy based upon this one isolated violation (A. 2, 24).

[4] The Administrative Law Judge, after careful consideration credited Hopkins testimony regarding their conversation over Weidman's denial. It is well recognized that credibility resolutions are matters for the trier of fact and the Board, and should not be upset on review absent extraordinary circumstances, not present here. *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965); *N.L.R.B. v. A. & S. Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

on the premises and his concomitant alleged unavailability to handle maintenance tasks until after he joined the Union. Indeed, the Company raised Hopkins' wages in May at which time he had been on the job for seven months. These factors, are more than ample to establish that Hopkins' discharge was at least "partially motivated by his union activity." *N.L.R.B. v. George J. Roberts & Sons, Inc., etc.*, 451 F.2d 941, 945 (C.A. 2, 1971); *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 131-132 (C.A. 2, 1970).

In addition, the Company's explanation for the discharge does not withstand scrutiny. The Company's claim that Hopkins had not made Sleepy Hollow Gardens his residence is contary to the facts as found. The Administrative Law Judge credited the testimony of Hopkins, his wife, and other supporting witnesses that both Mr. and Mrs. Hopkins moved into the Sleepy Hollow apartments shortly after Hopkins became resident manager and both resided there until Hopkins' discharge.[5] Moreover, it is apparent that the Company exaggerated the situation in claiming that Hopkins was wilfully and continually unavailable to remedy tenant complaints. The record does show that Hopkins consistently spent his days off at the home in Yonkers owned by Hopkins and occupied by his son (A. 9, 18, 19; 46, 261, 272, 273-274, 282-284). However, there was no showing that the times when the tenants could not reach Hopkins

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[5] For example, various tenants testified that Hopkins during the winter was available to restart the boiler on several occasions during the evening and in the middle of the night (A. 14-15; 116-118, 122-125, 126-127, 128, 137-138). In addition, Alexander Rizzo, the business partner of the Hopkins' son Robert, testified credibily that he picked up Mrs. Hopkins at the Sleepy Hollow Apartments several times a week to take her to the business run by Rizzo and Robert Hopkins where Mrs. Hopkins worked several days a week and left her off back at the apartment in the evenings (A. 18-19; 77-78, 83, 84, 276, 280, 285-288, 293-294).

occurred on days other than his days off. It should be noted that the Company does not claim that Mr. and Mrs. Hopkins were expected to remain on the premises continuously.

In addition, the Company's attempts to avoid liability by claiming to have made the discharge decision before Hopkins joined the Union on June 24 suffer from a lack of consistency. Thus, the Company's contention before the Board that it placed an advertisement for a resident superintendent in a local paper in March[6] pursuant to a decision previously reached to discharge Hopkins, is at variance with the testimony of Weidman, its vice president, that the precipitating cause for the discharge was in May following receipt of a complaint from the buildings department of Spring Valley about lack of maintenance coverage at the Sleepy Hollow Gardens Apartments (A. 20, 21; 211, 298).[7]

In sum, the timing of the Company's discharge of Hopkins shortly after it admittedly learned that Hopkins had joined the Union, the Company's anti-union hostility manifested in particular by its unlawful threat to find a reason to discharge Hopkins after having received confirmation from him that he had joined the Union, and the pretextuous nature of its explanation for the discharge, all support the Board's conclusion that Hopkins' discharge was because of his union activity.

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[6] The advertisement did not specify the name or address of the apartment development for which a resident superintendent was sought (R. 16; 298). The Administrative Law Judge concluded that through the advertisement in March the Company was seeking the replacement of a superintendent other than Hopkins (A. 20). He relied on testimony (A. 105, 110) that the Company told an applicant and his wife in an early June interview that it was seeking the replacement of a superintendent who had filed charges in court over union matters. Hopkins, as shown *supra*, did not sign up with the Union until June 24.

[7] The Administrative Law Judge did not credit Vice-President Weidman's testimony that he interviewed and hired a replacement for Hopkins on June 10, prior to Hopkins' joining the Union. According to Weidman's testimony, Weidman did not start work until July 1, and then only as Hopkins' assistant (A. 17, 21; 199-200, 221). The applicant did not testify.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Board's order be enforced in full.

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February 1976.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 19th day of February, 1976